Filed 8/31/06 P. v. Flenaugh CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELTON FLENAUGH, Defendant and Appellant.	A113069 (San Mateo County Super. Ct. No. SC058088)

Elton Flenaugh appeals from a judgment entered after he pled no contest to one count of vehicle theft. He contends the trial court abused its discretion by denying his request to dismiss a prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Flenaugh pled no contest to one count of vehicle theft (Veh. Code, § 10851, subd. (a)) and admitted to having suffered one prior strike conviction for attempted robbery (Pen. Code, §§ 212.5, 664, 1170.12, subd. (c)(1)). In exchange for the plea, the prosecutor agreed to dismiss felony charges of commercial burglary (Pen. Code, § 460, subd. (b)) and possession of stolen property (Pen. Code, § 496, subd. (a)). As part of the plea agreement, Flenaugh was promised that the court would "strongly consider" a *Romero* motion and that his maximum sentence would be 32 months in the event the court denied his *Romero* motion.

The probation report prepared for the sentencing hearing provides the following factual background on the present offense. Flenaugh and a codefendant drove to a local auto dealership in a rental car intending to steal cars. While Flenaugh waited outside in the

rental car, the codefendant went into the sales office and grabbed numerous new car keys. The codefendant left the sales office, threw several of the car keys to Flenaugh, and then drove off the lot in a new car. Flenaugh also drove away from the dealership, and an all-points bulletin went out for the two vehicles Flenaugh and the codefendant were driving. San Carlos police officers later apprehended Flenaugh. The codefendant, who was never caught, abandoned the stolen vehicle in Foster City and fled on foot. Flenaugh admitted he agreed to provide the codefendant with a ride in exchange for a payment of several hundred dollars. In a written statement, Flenaugh informed police he was desperate for money to buy drugs.

The probation officer described Flenaugh as relatively young but with a lengthy and serious criminal record. At the time of his arrest, Flenaugh was on probation for a May 2004 conviction for attempted robbery. The attempted robbery conviction resulted from an incident in which Flenaugh attempted to take seven liquor bottles from a grocery store. On that occasion, Flenaugh punched a store employee in the neck after attempting to hit the employee with a liquor bottle.

Flenaugh told the probation officer he wanted the opportunity for residential treatment for drug and alcohol addiction. He reported abusing marijuana since the age of 12, and he considered himself addicted to ecstasy and alcohol. For sentencing purposes, the probation officer found that circumstances in aggravation included the attempted robbery of an item of great value, Flenaugh's prior convictions as an adult as well as his numerous sustained petitions in juvenile delinquency proceedings, a prior prison term in the California Youth Authority, and Flenaugh's status as a probationer at the time of the present offense. The only circumstance in mitigation was Flenaugh's voluntary admission of wrongdoing at an early stage of the criminal proceedings.

Flenaugh moved to dismiss his prior strike conviction under *Romero*. At the sentencing hearing on February 2, 2006, the trial court denied the *Romero* motion. The court stated: "You've run out of chances here, Mr. Flenaugh. I'm not impressed with your record, your disregard for other people's rights and the repeated failures on probation. You had a bad juvenile record and you ended up in CYA. That didn't have any impact on you,

so my thinking is there isn't really any justification to grant the *Romero* motion . . . ." The court imposed the lower term of 16 months for vehicle theft, doubled under Penal Code section 1170.12, subdivision (c)(1), for a total term of 32 months. Flenaugh filed a timely notice of appeal.

DISCUSSION

Flenaugh contends the trial court abused its discretion by refusing to dismiss his prior strike conviction under Penal Code section 1385, asserting that the court ignored "predominant factors" supporting dismissal and instead relied entirely on his recidivist status. We disagree.

Penal Code section 1385, subdivision (a) permits a trial court "in furtherance of justice" to strike a prior felony conviction in cases brought under the "Three Strikes" law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The trial court's denial of a motion to dismiss a strike allegation is reviewed for abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 158; *Romero, supra,* 13 Cal.4th at p. 531.) The Supreme Court has "stressed that '[a] court's discretion to strike prior felony conviction allegations in furtherance of justice is limited.' [Citation.]" (*People v. Garcia* (1999) 20 Cal.4th 490, 497.)

When considering a motion to dismiss a strike allegation, a trial court may give "no weight whatsoever . . . to factors extrinsic to the [Three Strikes] scheme, such as the mere desire to ease court congestion or, a fortiori, bare antipathy to the consequences for any given defendant. [Citation.]" (*People v. Williams, supra,* 17 Cal.4th at p. 161.) Instead, the trial court must give "preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects. [Citation.]" (*Ibid.*) Ultimately, a court must determine whether "the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*; accord *People v. Garcia, supra,* 20 Cal.4th at p. 500.)

Here, Flenaugh had a substantial criminal history despite his young age. He had two prior felony convictions and several prior misdemeanor convictions, including his prior

conviction for attempted robbery, for which he received a prison sentence. Contrary to Flenaugh's contention that none of his crimes were violent in nature, the incident giving rise to his attempted robbery conviction involved violence, including an attempt to strike a grocery store employee in the head with a liquor bottle. Flenaugh failed repeatedly on probation and on parole. Indeed, he was on probation at the time of the present offense.

Moreover, the probation officer noted that Flenaugh "has continued his actions unabated, with no thought of the law or the rights of others. His actions demonstrate a complete disregard for court directives and a failure to identify how his choices can and will affect his future." Referring to this section of the probation report at the sentencing hearing, the trial court queried why it should believe that Flenaugh intended to change.

The only mitigating circumstance identified by the probation officer was that Flenaugh had voluntarily admitted wrongdoing at an early stage of the criminal proceedings. This is hardly a compelling factor, however, in light of the fact that Flenaugh failed to appear for court hearings on two occasions, resulting in the issuance of bench warrants for his arrest. Although it appears that Flenaugh was incarcerated at the time of his second failure to appear, there is no indication he had any such excuse for failing to appear on the first occasion that resulted in the issuance of a bench warrant.

Flenaugh's contention that the trial court ignored predominant factors supporting his motion to dismiss is unavailing. While Penal Code section 1385 requires a court to state reasons for exercising its discretion to strike or dismiss, a court is not required to state any reasons for *declining* to exercise that power. (See *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032.) "Where the Legislature establishes a sentencing norm and requires the court explicitly to justify a departure therefrom, and the court sentences in conformity with the legislative standard, all that is required on the appellate record is a showing that the court was aware of its discretion to select an alternate disposition. [Citation.]" (*People v. Langevin* (1984) 155 Cal.App.3d 520, 524.) Furthermore, it is presumed that the court knows and correctly applies the law. (*People v. Mack, supra,* 178 Cal.App.3d at p. 1032.) It is the appellant's burden to demonstrate otherwise. (*People v. Henson* (1991) 231 Cal.App.3d 172, 182.)

The trial court was plainly aware it had discretion to grant the *Romero* motion. Contrary to Flenaugh's contention, his recidivist nature was a proper factor for the court to consider.[1] (See *People v. Garcia, supra,* 20 Cal.4th at p. 501 [recidivist status is " 'undeniably relevant' "].) There is no indication in the record that the trial court considered or relied upon improper factors or considerations extrinsic to the Three Strikes scheme. Rather, the record supports the conclusion the court properly considered factors central to the Three Strikes scheme, including the particulars of Flenaugh's background, character, and prospects. Accordingly, Flenaugh has failed to establish an abuse of discretion with regard to the denial of his *Romero* motion.

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Siggins, J.

[1] Flenaugh cites *People v. Garcia, supra,* 20 Cal.4th at p. 501, for the proposition that a defendant's recidivist status is not dispositive on whether to strike a prior felony conviction under *Romero*. In *People v. Garcia*, the main concern addressed in connection with a defendant's recidivist status was whether a mandate to ensure longer prison sentences would predominate the trial court's exercise of its discretion to dismiss prior strike convictions, effectively eliminating that discretion. (*Id.* at pp. 501-502.) Here, there is no indication the trial court's predominant concern was ensuring that Flenaugh serve the longest possible sentence.